

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN SHERODD DOSS,

Defendant-Appellant.

UNPUBLISHED

March 15, 2011

No. 295511

Berrien Circuit Court

LC No. 09-000522-FC

Before: HOEKSTRA, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Justin Sherodd Doss asserts ineffective assistance of counsel, prosecutorial misconduct and improper scoring of the sentencing guidelines in challenging his jury trial convictions for armed robbery¹, felon in possession of a firearm², carrying a concealed weapon³, assault with a dangerous weapon⁴, and two counts each of possession of a firearm during the commission of a felony (felony-firearm)⁵ and assault with intent to rob while armed.⁶ Doss was sentenced as a third habitual offender⁷ to 240 to 600 months' imprisonment for the armed robbery and for each of the assault with intent to rob while armed convictions, 43 to 120 months' imprisonment for each of the felon in possession of a firearm convictions and the carrying a concealed weapon conviction, two years' imprisonment for each conviction of felony-firearm, and 36 to 96 months' imprisonment for the assault with a dangerous weapon conviction. We affirm.

¹ MCL 750.529.

² MCL 750.224f.

³ MCL 750.227.

⁴ MCL 750.82.

⁵ MCL 750.227b.

⁶ MCL 750.89.

⁷ MCL 769.11.

Doss asserts that his trial counsel was ineffective for failing to impeach two prosecution witnesses, Anthony Brown and Jeremy Scott, with their previous convictions and for the minimal cross-examination conducted with these individuals. To establish the ineffective assistance of his counsel, Doss must demonstrate: (1) that his attorney's performance was deficient because it fell below an objective standard of reasonableness under accepted or prevailing norms and (2) that the deficient performance by his attorney prejudiced his defense.⁸ In order to prove that he was prejudiced by counsel's performance, Doss must show that but for the errors of his attorney there is a reasonable probability that the outcome of the proceedings would have been different.⁹ Due to the lack of an evidentiary hearing on this matter, our review is limited to errors apparent on the record.¹⁰

Doss first contends that counsel was ineffective for his failure to impeach these individuals by using their previous convictions because the credibility of witnesses was extremely important in this case. While Brown and Scott did each have a previous conviction that could have been used for impeachment purposes, Doss cannot demonstrate that if his counsel had used the convictions to impeach these witnesses there is a reasonable probability that the outcome of the trial would have been different.¹¹ When testifying Brown and Scott both acknowledged having been in jail, implying a lack of trustworthiness to the jury without the necessity of counsel's further input or emphasis. In addition, the testimony of several other witnesses fully comported with Brown's version of the alleged events and Scott's assertion that Doss had given him a note to be delivered to Brown while all three of these individuals were incarcerated. Other testimony also provided evidence of Doss' guilt regarding the charged crimes. While Doss attempts to submit an affidavit from his trial counsel asserting that his election to not impeach these witnesses with their earlier convictions was not a matter of trial strategy, because this document is not part of the lower court record and constitutes an improper expansion of that record, we decline to consider it.¹²

Doss further contends that counsel was ineffective for the cursory cross-examination conducted of these two witnesses. "Decisions regarding what evidence to present and whether to . . . question witnesses are presumed to be matters of trial strategy."¹³ Any deficiency or failure to question witnesses constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense.¹⁴ A substantial defense is defined as "one that might have

⁸ *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

⁹ *Strickland*, 466 US at 694.

¹⁰ *People v Scott*, 275 Mich App 521, 526; 739 NW2d (2007).

¹¹ *Strickland*, 466 US at 694.

¹² MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004).

¹³ *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

¹⁴ *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

made a difference in the outcome at trial.”¹⁵ Counsel’s failure to pose questions to Scott may have comprised a tactical decision to minimize references to this individual’s contact with Doss in a jail setting and an effort to de-emphasize or shift focus from the efforts by Doss to influence witnesses in this case while in jail. The limited cross-examination conducted with Brown may also have comprised a strategic decision to preclude an opportunity by Brown to repeat or expand on his testimony regarding Doss’ involvement in the crimes. Ample evidence was provided by other witnesses that supported Brown’s version of the events. Scott’s testimony was also supported by other witnesses who observed his interaction with Doss and by the proffer of additional evidence of similar incidents involving Doss attempting to communicate and influence witnesses while in jail. Because sufficient evidence of Doss’ guilt existed and further cross-examination of these two witnesses would not have provided Doss with a substantial defense that would have altered the outcome of trial, his assertion of ineffective assistance of counsel for failing to engage in a more protracted cross-examination cannot be sustained.

Doss further asserts the prosecutor engaged in misconduct by asking an inflammatory question that was not based on the evidence and that failure of his counsel to object to this question constituted ineffective assistance. Because counsel did not object, we review for plain error that affected Doss’ substantial rights.¹⁶ A conviction will be overturned only if a plain error affecting substantial rights exists, and it is determined that Doss was actually innocent or if the error “seriously affected the fairness, integrity, or public reputation of judicial proceedings.”¹⁷ “[W]here a curative instruction would have alleviated any prejudicial effect we will not find error requiring reversal.”¹⁸

Keenan Watkins, a witness and victim of the alleged crimes, repeatedly indicated he could not recall any of the events or his statement to police when questioned by the prosecutor. A reading of the transcript of Watkins’ verbal responses, or lack thereof, indicates that he was an uncooperative witness and contumacious in his answers to inquiries by the prosecutor. In an effort to pin Watkins down regarding his memory, the prosecutor queried whether he recalled that his sister-in-law, who was also a victim and present at the time of the alleged crimes, was pregnant when the events occurred. Although Watkins answered in the affirmative that his sister-in-law was pregnant at the time and remained so at the time of the trial, he failed to respond or provide an audible response to several subsequent related questions. When Watkins then asserted that he simply couldn’t remember and had “a bad memory,” the prosecutor queried:

So you would – you’re telling us that you’re not sure if you’d remember if there was [a] gun pulled out in the house and someone raped your pregnant sister-in-law and held you and your brother at gunpoint on a couch?

¹⁵ *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

¹⁶ *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

¹⁷ *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

¹⁸ *Id.* at 449 (citation omitted).

Doss asserts it was misconduct for the prosecutor to indicate that one of the victims of the robbery was raped when there had been no such allegation or evidence and was highly prejudicial. As this is the only such reference or use of the term “raped” in the entire trial and given the context of the questioning and the obvious frustration of the prosecutor with this witness, a more plausible explanation would be that the prosecutor simply misspoke when he used the term. Based on the facts of the case, the context of the question, the one-time use of the term and the lack of any response or reaction by the trial court or defense counsel it would seem more probable that it was understood that the prosecutor intended to say “robbed” rather than “raped.” To suggest, as does Doss, that this one reference or use of the term while questioning an extremely recalcitrant witness was an attempt by the prosecutor to improperly prejudice the jury is mere hyperbole. Doss was not charged with any criminal sexual conduct, there was no argument or any other suggestion that he had engaged in such actions during the criminal events. The pregnant victim was robbed as her purse was taken from her and removed from the scene by Doss and his cohorts. To suggest that this single, clearly inadvertent reference was sufficient to compromise or confuse the jury is ludicrous given the plethora of testimony received on the actual charges Doss faced. Because jurors are presumed to follow their instructions¹⁹ and the trial court did instruct the jury that questions, comments and argument by the attorneys was not evidence and that they could only consider “evidence that has been properly admitted” in reaching their verdict, any potential for prejudice by this isolated misstatement was precluded. Concomitantly, as there is no reasonable probability that the outcome of this trial would have been different but for the failure of Doss’ trial counsel to object to this statement, his claim of ineffective assistance of counsel cannot be sustained.

Finally, Doss asserts two scoring errors in his sentencing regarding offense variables (OVs) 3 and 13.²⁰ This Court reviews the interpretation and application of the statutory sentencing guidelines de novo.²¹ “A sentencing court has discretion in determining the number of points to be scored [when calculating the sentencing guidelines], provided that evidence of record adequately supports a particular score.”²² We review preserved scoring issues to determine if the sentencing “court properly exercised its discretion and whether the evidence adequately supports a particular score.”²³ “Scoring decisions for which there is any evidence in support will be upheld.”²⁴

¹⁹ *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

²⁰ MCL 777.33; MCL 777.43.

²¹ *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

²² *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

²³ *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citation omitted).

²⁴ *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Doss contends the trial court abused its discretion when scoring five points for “physical injury to [a] victim” under OV 3.²⁵ Specifically, five points are to be scored if “[b]odily injury not requiring medical treatment occurred to a victim.”²⁶ The trial court determined that five points were appropriately assigned under OV 3 because one of the victims during the robbery was struck in the back of the head with a handgun. Although the victim was not rendered unconscious and the victim discounted the force of the impact, it was reasonable for the trial court to infer that a bodily injury was incurred, even if any such injury was minimal. Because the evidence supports the trial court's scoring of OV 3, we are compelled to uphold the trial court's scoring of this variable.²⁷ We note without deciding so, merely as an aside, that even if we were to find that this variable was improperly scored resentencing would not be required as the guidelines range would remain unchanged.²⁸

Doss’ second contention of error regarding scoring of the sentencing guidelines involves the assignment of 25 points for a “continuing pattern of criminal behavior” under OV 13.²⁹ Specifically, 25 points are to be scored when “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.”³⁰ The statute requires that “[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.”³¹ “[O]nly those crimes committed during a five-year period that encompasses the sentencing offense can be considered.”³² Contrary to Doss’ argument, the plain language of the statute³³ indicates that a sentencing court must include all contemporaneous crimes.³⁴ Because Doss was convicted of assault with a dangerous weapon and two counts of assault with intent to rob while armed in addition to his conviction for armed robbery, there existed a sufficient basis for the trial court’s assignment of 25 points on this variable to satisfy the statutory requirement that “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.”³⁵ Doss’ contention that we should convene a conflict panel based on his

²⁵ MCL 777.33.

²⁶ MCL 777.33(1)(e).

²⁷ *Endres*, 269 Mich App at 417.

²⁸ *People v Francisco*, 474 Mich 82, 89 n 8; 777 NW2d 44 (2006).

²⁹ MCL 777.43.

³⁰ MCL 777.43(1)(c).

³¹ MCL 777.43(2)(a).

³² *Francisco*, 474 Mich at 86.

³³ MCL 777.43(2)(a).

³⁴ See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

³⁵ MCL 777.43(1)(c).

citation to unpublished cases is without merit as we are bound by the published authority that supports our conclusion in this case.³⁶

Doss again asserts that trial counsel was ineffective for failing to object to the scoring of OV 3 and OV 13. Having found no error by the trial court in the scoring of these variables, his contention of ineffective assistance of counsel is not viable.³⁷

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

³⁶ MCR 7.215(J)(1).

³⁷ *People v Davenport*, 286 Mich App 191, 199; 779 NW2d 257 (2009).